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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 316

WESTERN AIR LINES, INC.,
Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

Appeal from the Supreme Court of the State of California.

APPELLEE'S MOTION TO DISMISS OR AFFIRM.

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No. 316

WESTERN AIR LINES, INC.,	*Appellant,*
vs.	
PEOPLE OF THE STATE OF CALIFORNIA,	*Appellee.*

Appeal from the Supreme Court of the State of California.

APPELLEE'S MOTION TO DISMISS OR AFFIRM.

Appellee in the above-entitled case moves to dismiss or affirm on the ground that the appeal does not present a substantial federal question for the reasons that:

1. Both of the precise questions presented by this appeal have been previously decided by this Court in an appeal involving the same cause of action and substantially the same parties, and said questions are therefore *res judicata.*

2. Said questions are intrinsically so unsubstantial and devoid of merit as not to warrant this Court in hearing argument upon them.

ARGUMENT.

I.

THE QUESTIONS PRESENTED ARE RES JUDICATA.

On page 8 of its Jurisdictional Statement appellant refers briefly to its prior appeal to this Court which was dismissed for want of a substantial federal question. (*Western Air Lines, Inc., v. Public Utilities Commission of the State of California*, 342 U.S. 908; October Term 1951, No. 465.)

It appears on pages 7 and 8 of said Jurisdictional Statement, in appellant's "Statement of the Case", that both the former and the present appeal arose out of the same cause of action, namely, appellant's increasing its intrastate air coach fares between Los Angeles and San Francisco, California, without having previously obtained authority therefor from the Public Utilities Commission of the State of California, contrary to California law.

In the former case, the appeal to this Court was from the denial by the California Supreme Court of a petition for a writ of review of a decision of said Commission which authorized and established said increased fares but ordered appellant to make reparation to passengers who had paid such increased fares prior to the time they were authorized.

In the present case, the appeal is from the reversal by the California Supreme Court of a judgment for the

defendant entered by the trial court after sustaining a demurrer to a complaint brought against the appellant in the name of the People of the State of California by the attorney of said Commission pursuant to law, seeking penalties which were alleged to have been incurred by the appellant under California law as a result of its having thus increased said fares without authority.

In these two proceedings the cause of action is the same, that is, the raising of certain fares without authority. The difference between them is in the remedy pursued for that cause of action.

In the former appeal the questions presented were described by the appellant on page 12 of its "Statement As To Jurisdiction" in that appeal (judicial notice of which may be taken [*United States v. Pink*, 315 U.S. 203, 216, 86 L. ed. 796, 810]) in the following language:

"*Basic Questions Presented*

"The basic questions which will be presented by the appeal, to one or the other of which each of the assignments of error listed in the Assignment of Errors compiled under Rule 9 of the Rules of the Supreme Court of the United States is related, are:

"1. Has the Civil Aeronautics Act of 1938, as amended, (52 Stat. 977, 49 USC 401 et seq.) preempted the entire field of civil aviation to the exclusion of the right or power of any state or of any state agency to exercise jurisdiction or authority over commercial air transportation?

"2. Is the Order of the Public Utilities Commission of the State of California, purporting to regulate the air coach tariff over an interstate segment of a

federally certificated interstate air route, a burden on interstate commerce and thus in violation of Subsection 3 of Section 8, Article I of the Constitution of the United States?"

A comparison of these questions with those set out on page 6 of the Jurisdictional Statement in the present appeal will show that the two groups of questions are in substance identical with each other, the only differences being in the order in which the two questions are set out, and certain immaterial differences in phraseology. In both appeals one of the questions is whether the Congress of the United States has fully occupied the field of regulation of commercial air transportation. The other question in both appeals is whether state regulation of air carriers is a burden on interstate commerce in violation of Article I, Section 8, subsection 3 of the Constitution of the United States.*

It will thus be seen that the underlying issue in each of these two proceedings is the same, namely, the lawfulness of the exercise of state power in regulating air carrier intrastate fares between Los Angeles and San Francisco, California. In the former appeal such regulation took the form of establishing fares and ordering reparations; in

*In the "Questions Presented" in the present appeal it appears somewhat more clearly than in the former appeal that the appellant is raising the question of the validity of state regulation of *intrastate* operations of air carriers. However, reference to other portions of the former "Statement As To Jurisdiction", viz., pp. 2, 3, 9, 10, 11, shows that regulation of *intrastate* commerce, specifically air coach transportation between Los Angeles and San Francisco, was there in issue.

the present a complaint for penalties. As already indicated, these are merely two different procedures for implementing the same state power, that is, the power to regulate common carrier rates.

Sunshine Anthracite Coal Co. v. Adkins (1939), 310 U.S. 381, 401, 84 L. ed. 1263, 1275.

Moreover, the parties in the two appeals are substantially the same.

Sunshine Anthracite Coal Co. v. Adkins, supra.

In the former appeal the Public Utilities Commission of the State of California became the appellee after a proceeding in which said Commission, exercising the state's delegated power over the rates of common carriers, issued a decision establishing certain fares and ordering appellant to make reparation of fares unlawfully collected, the Commission becoming a nominal party in this Court.

In the present appeal the state is itself a party after bringing an action for penalties (the attorney of said Commission acting for it pursuant to law [California Public Utilities Code, Section 2104]), as an alternative and cumulative sanction for its power over the rates of common carriers.

In *Sunshine Anthracite Coal Co. v. Adkins,* supra, this Court on page 402 (L. ed. p. 1276) quoted from its decision in the case of *Chicago R.I. and P.R. Co. v. Schendel,* 270 U.S. 611, 620, 70 L. ed. 757, 764, as follows:

> "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, . . . and parties nominally different may be, in legal effect, the same."

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This Court then added:

> "A judgment is res judicata in a second action upon the same claim between the same parties or those in privity with them. [Citing *Cromwell v. Sac. County*, 94 U.S. 351, 24 L. ed 195.] There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government."

In the case cited, i.e., *Sunshine Anthracite Coal Co. v. Adkins,* this Court held that a certain commission created by Congress "represented the United States" in a prior proceeding and that the United States as well as the appellant in that proceeding was bound thereby.

Likewise in the prior appeal brought by Western Air Lines, Inc., the Public Utilities Commission represented the State of California, and the state as well as the appellant was bound by the decision therein.

Since the cause of action, the parties and the issues are the same in this as in the former appeal, the questions presented herein are *res judicata.*

Sunshine Anthracite Coal Co. v. Adkins, supra.

In the case just cited, this Court also said at page 403 (L. ed. p. 1276): ". . . In general the principles of *res judicata* apply to questions of jurisdiction as well as to other matters—whether it be jurisdiction of the subject matter or of the parties."

It does not matter whether the questions presented in the present appeal are considered as *res judicata* by virtue

of the decision itself of the Public Utilities Commission of the State of California, or by virtue of the decision of the California Supreme Court denying review without opinion, or by virtue of this Court's dismissing the appeal from such denial. (See discussion and cases cited on pp. 5-10 of Appendix A of Jurisdictional Statement in present appeal; also *Angel v. Bullington,* [1946] 330 U.S. 183, 190, 91 L. ed. 832, 837, where this Court held that the doctrine of *res judicata* may arise as a result of an adjudication declining to reach the merits of the issues presented.)

In any event, the questions presented by the present appeal have been finally adjudicated. The appellant has already exhausted its rights with respect to those questions and is not entitled to relitigate them.

Angel v. Bullington, (1946) 330 U.S. 183, 190-192, 91 L. ed. 832, 837, 838.

As already indicated, appellee urges that as between the present and former appeals, there is identity of cause of action as well as parties and issues, and therefore that the issues presented in the present appeal are *res judicata* in the strictest sense of that doctrine.

However, even if it could be properly said that the cause of action is different in the two appeals, nonetheless the issues presented in the prior proceeding are identical with those presented here. The parties being substantially identical, the doctrine of collateral estoppel would therefore be effective as a bar to any further consideration of those issues.

Commissioner v. Sunnen (1947), 333 U.S. 591, 92 L. ed. 898.

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II.

THE QUESTIONS PRESENTED ARE INTRINSICALLY SO UNSUBSTANTIAL AND DEVOID OF MERIT AS NOT TO WARRANT THIS COURT IN HEARING ARGUMENT UPON THEM.

Appellee's argument upon the merits of the questions presented in this appeal have been set out in its "Statement in Opposition to Appellant's Statement of Jurisdiction and Motion to Dismiss or Affirm" filed in the former appeal, viz., *Western Air Lines, Inc. v. Public Utilities Commission of the State of California,* October Term 1951, No. 465.

Appellee here refers the Court to that argument if it desires to re-examine the merits of those questions. Appellee does not deem it necessary or desirable to repeat the argument at length here.

Briefly, Appellee's argument was (and is) as follows:

1. Numerous decisions of this Court establish the principle that until such time as the Congress pre-empts the entire field of regulation, both interstate and intrastate, common carriers and utilities are subject to state regulation insofar as intrastate operations are concerned, even though their interstate operations are regulated by federal authority; and such state regulation is not a burden on interstate commerce.

2. The absence of any intention of Congress to pre-empt the entire field of economic regulation of air transportation is manifest from the language of the Civil Aeronautics Act of 1938, as amended (52 Stat. 977, 49 U.S.C. 401, et seq.), as well as from the repeated refusal of Congress to enact proposed legislation designed to extend federal regulation to intrastate air transportation.

On pages 14 and 15 of said "Statement in Opposition to Appellant's Statement of Jurisdiction and Motion to Dismiss or Affirm", reference was made to certain bills introduced in Congress and to certain reports of the proceedings of the National Association of Railroad and Utilities Commissioners containing discussions of those bills and the opposition they met in Congressional committees. Reference was also made thereto by the California Supreme Court in its decision in the present case (See pp. 27, 28 of Appendix "A" to present "Statement as to Jurisdiction").

From this legislative history, as well as from the language of the Civil Aeronautics Act itself, it is abundantly clear that Congress had no intention of precluding state economic regulation of intrastate air transportation.

> "The intention to interfere with the state function of regulating intrastate rates is not to be presumed. Where there is a serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power. * * *"
>
> *Arkansas Railroad Commission v. Chicago R.I. & P. Co.* (1927), 274 U.S. 597, 603, 71 L. ed. 1224, 1228.

Although the legislative history above described is not encouraging to the proponents of exclusive federal regulation of air transportation, nonetheless Congress, and not this Court, is the proper forum to which resort must be had if state regulation is to be foreclosed.

Appellee submits that this appeal is so utterly lacking in merit as to risk being labelled frivolous. Whether it

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deserves that characterization, appellee leaves to this Court to decide.

Dated: San Francisco, California,
September 20, 1954.

Respectfully submitted,

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